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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR EXPEDITED CONSIDERATION OF PETITION FOR CERTIORARI

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Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") move for expedited consideration of their petition for certiorari filed in this action today. As grounds therefor, petitioners state that the Court has granted certiorari in *Norris* v. *Arizona Governing Committee*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52), which case involves application of this Court's decision in

Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 (1978). The *Spirt* case also involves *Manhart* and a particularly direct conflict among the Circuits as to its proper application to petitioners' pension system. Petitioners believe that any application or clarification of *Manhart* should be heard in light of the broader scope of the instant case which presents different and more complex issues relating to *Manhart* than does *Norris*. Accordingly, we urge that TIAA-CREF's petition for certiorari be granted expedited consideration so that, if it be granted, the *Spirt* case may be heard at the same time as *Norris*.

REASONS FOR EXPEDITING CONSIDERATION OF THE PETITION

TIAA and CREF are independent insurers offering insurance and annuity contracts to employees of educational and research institutions through insured pension plans. More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. Since 1974, TIAA-CREF have been involved in a number of actions raising claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1976 & Supp. IV 1980), growing out of its use of sex-distinct mortality tables to compute annuity benefits. The issue arises because the use of such tables, standard practice in the insurance and pension industry, gives due recognition to the greater longevity of women as a group. Given equal annuity contributions, it is thus necessary to pay periodic benefits at a lower rate to the women than to similarly situated men in order not to exhaust the funds contributed by the women while some of them are still living. There are now pending some nine cases in various federal

courts against TIAA-CREF involving this issue, and three courts of appeals have passed upon TIAA-CREF cases.

As TIAA-CREF's petition points out, there is now a square conflict between the Sixth Circuit (in *Peters* v. *Wayne State University*, Nos. 79-1658, -1670, -1671 (6th Cir. October 14, 1982)) and the Second Circuit (in *Spirt*) concerning the application of Title VII and the *Manhart* decision to TIAA-CREF. As a result of the *Spirt* decision in the Second Circuit, TIAA-CREF is prohibited* nationwide from using sex-distinct mortality tables in calculating annuity benefits on the ground that their use is discriminatory under Title VII. At the same time, the Sixth Circuit has held that the use of these tables is entirely lawful under that statute. A prompt resolution of this conflict is urgently required by TIAA-CREF, their 700,000 participants and 3,400 participating institutions.

That there is a need for guidance and clarification of *Manhart* seems clear. As the First Circuit said in *EEOC* v. *Colby College*, 589 F.2d 1139, 1143 (1st Cir. 1978), "[w]hether by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were." The large number of cases involving *Manhart* and their varying rationales serve but to emphasize this point (*see* Petition at 13 n.5). The problem arises, as was noted in *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), "from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." A decision in the *Norris* case will doubtless require an interpretation of *Manhart*, but *Norris* essentially focuses

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* The Second Circuit's mandate has been stayed pending disposition of the accompanying petition.

on: (1) the "open market" exception of *Manhart* (435 U.S. at 717-18), an issue not involved here, and (2) on a deferred compensation plan rather than on a pension plan. We believe that the *Spirt* and *Peters* cases present a much broader range of issues against which the Court can also re-examine, clarify, and apply *Manhart*.

The focus of *Norris* is quite different from that in *Spirt* and *Peters*. *Spirt* and *Peters* present an insurer's justification for the use of sex-distinct mortality tables. No insurer is involved as a party in *Norris*. *Spirt* and *Peters*, but not *Norris*, present the question whether an independent insurer is the "employer" of its annuitants within the meaning of Title VII. The applicability of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (1976), is not raised in *Norris*. In *Spirt* and *Peters*, however, TIAA-CREF claim that the subject risk classification practices constitute the "business of insurance" and that they, and thus their participating institutions, are exempted by McCarran from Title VII coverage. Most importantly, *Spirt* raises very substantial questions of retroactive application of *Manhart*, an issue not raised in the *Norris* petition. Indeed, even the requirement of showing discriminatory intent under Title VII, presented by both *Norris* and *Spirt*, requires the examination of somewhat different contentions in those two cases.

The questions raised by *Spirt* are questions of enormous import not only to the petitioners but to the insurance industry at large. The use of sex-distinct tables is a standard actuarial practice throughout the industry. Use of such tables proceeds not from any purpose to discriminate but, as the *Peters* court found, because the usage is required and supported by "common sense." TIAA-CREF, and the insurance industry as a whole, seek clarification as to the parameters of this Court's state-

ment in *Manhart*, 435 U.S. at 717, that "we do not suggest that [Title VII] was intended to revolutionize the insurance and pension industries." We believe the need for clarification can best be met by granting certiorari in *Spirt* and setting it down for argument at the same time as *Norris*.

We are authorized to state that the plaintiff Spirt and the Superintendent of Insurance of the State of New York have no objection to the granting of the writ and agree, if certiorari be granted, that argument in *Spirt* should be scheduled on the same date as that in *Norris*.* The respondent Long Island University authorizes us to state that it is in favor of a grant of certiorari in this case. It agrees with TIAA-CREF's position that the *Spirt* case should be heard at the same time as *Norris*. It wishes to submit its views on certiorari to the Court and advises it will do so as expeditiously as possible.

There are two other parties with tangential standing. While the *Spirt* case was on remand, in 1981, seven years after the case was brought, the Equal Employment Opportunity Commission ("EEOC") and the American Association of University Professors ("AAUP") sought to intervene. The District Court denied the general intervention sought by the EEOC, but did permit partial intervention as to both limited to one question relating solely to relief. The AAUP, we understand, opposes certiorari. We are not advised as to the position of the Solicitor General respecting the EEOC.

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* Plaintiff supports the result reached by the Second Circuit and reserves her position on the merits.

CONCLUSION

For all the foregoing reasons, petitioners pray that the Court grant expedited consideration to their petition, and if certiorari be granted, as urged in the petition, that the case be set down to be heard on the same date as *Norris*.

Respectfully submitted,

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